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NO. 253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, *Petitioner*

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on February 2, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 22-26) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 2, 1948 (R. 26). A motion for a

new trial, seasonably filed, was denied on June 1, 1948 (R. 27). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, in derogation of the legislative and executive policy governing termination of war contracts during World Wars I and II, the Court of Claims may properly award a contractor substantial anticipated but unearned profits, where his contract was cancelled on the same day that the notice of award was received, and before any work had been done, commitments made, or expenditures incurred.

2. Whether the Court of Claims' ultimate "finding" that respondent would have successfully completed the contract at a substantial profit can support its judgment where the findings of the evidentiary or primary facts are directly to the contrary.

STATEMENT

The Court of Claims' findings disclose the following pertinent facts:

In 1911, respondent, a Virginia manufacturing corporation, was incorporated and acquired a plant (at Waynesboro, Virginia), mainly built in 1890, which was equipped with certain machinery and equipment, to which respondent shortly added other used machinery (R. 16-17). From that time

until about 1931 the plant was "actively engaged," but since 1931 it has been used for "minor engagements" only, requiring not more than four or five employees. In January, 1941 it had been idle for some years (R. 16-17). At that time, the respondent's officers were engaged in other businesses at or near Pittsburgh, Pennsylvania; one stockholder and director, who had been the plant's local manager when it was in operation and continued to be the company's local manager and statutory agent, was in the real estate business in Waynesboro (R. 17). (Apparently, respondent had no other factory or business.)

With the acceleration of the national defense program, late in 1940 and early in 1941, respondent's officers desired to procure a defense contract, and in January, 1941, engaged H. M. Johnson, as assistant to the president, and in February, 1942, Gordon Kennedy, an engineer, as general manager (R. 17, 20) (*infra*, p. 7). Throughout the year 1941, Mr. Johnson actively sought a Navy contract for respondent. A conference was held in January, 1941; in April the company submitted a proposal for the manufacture of 500 three-inch 50-caliber gun mounts; sometime before July, it submitted a list of equipment owned by it or deemed available; in July, a representative of the Navy's Gun Mount Section inspected respondent's plant and also talked to Kennedy; in September, at a conference at the Bureau of Ordnance, the company was asked to furnish

information as to its financial ability, commitments of sub-contractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 3-inch 50-caliber mounts; on October 7, 1941, respondent submitted additional information; and on December 13, 1941 it slightly modified its previous proposals (R. 17). At a meeting with the Navy's Bureau of Ordnance, on December 22, 1941, respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory, and respondent agreed to furnish a letter from a surety company indicating that a performance bond of the nature required by the Navy Bureau of Supplies and Accounts, the contracting agency, would be furnished (R. 17).

Respondent was then given a letter of intent, dated December 29, 1941, confirming the Navy's intent to place an order for the manufacture of 150 gun mounts, two to be delivered in May, 1942, three in June, 1942, five in July, 1942, and thereafter at least ten to be delivered per month. The letter authorized respondent "to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order * * *." If an order were not placed with respondent by April 1, 1942, the Government was to make reimbursement for all costs incurred and to assume all obligations for any commitments made (R. 17-18). This letter of intent was accepted by respondent on

January 10 1942, and then returned to the Navy Department (R. 18). Before this acceptance, respondent had received a Navy letter, dated January 7, 1942, stating that it was understood, pursuant to the agreement reached at the December meeting, that no expenditures were to be made under the letter of intent "until such time as you furnish a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract is executed" (R. 18).

No letter from a surety company having been received by January 29, 1942, the Navy advised respondent on that day that failure promptly to submit such a letter might result in the termination of the letter of intent. On February 3, 1942, respondent's representative submitted a letter in which the surety indicated that a performance bond in connection with a contract of this size would have to be reinsured and that unless some changes were made in respondent's financial set-up, reinsurance would be declined; but that if respondent accomplished either of two suggested refinancing plans and also furnished certain information as to new key personnel to be engaged by it, reinsurance could be obtained and the surety company could execute the bond. Respondent's representative, who presented this letter to the Navy Department, testified that the official who received it said flatly that it was satisfactory; a government witness testified that he overheard the conversation and that it

was to the effect that the letter would be considered to determine whether it was satisfactory (R. 18-19).

Respondent's plant was twice visited, in January and February, 1942, by government representatives. On January 16th and 17th, naval inspectors found no one at the plant except the watchman and the local manager; no work at all was being performed at that time. On February 19, 1942, a War Production Board naval ordnance production specialist found only the watchman at the plant; the local manager was called from his real estate office and accompanied the production specialist in inspection of the plant, and a conference was also had with Mr. Johnson who was called to Waynesboro for the purpose. Reports of both of these visits were given to the Navy Department (R. 19).

The Court of Claims found that on February 19, 1942, the respondent company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts (R. 19). Respondent's foundry was incapable of producing the cast steel forgings required for the gun mounts. It was respondent's plan, known to the Government, to subcontract for these castings, as well as for other parts of the work. Respondent had contacted certain producers, who were willing to furnish castings and other parts. No actual contracts for the castings or for any other parts had been made; but, the court found, there was no reason to suppose that the com-

pany could not have obtained these parts from subcontractors (R. 19). For the bulk of its labor supply, respondent expected to obtain former railroad shop mechanics residing near Waynesboro; its plans called for around 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts (R. 19).

The Court of Claims also found that the construction of gun mounts is difficult and exacting work; that manufacturers experienced in somewhat similar work, with large organizations and trained mechanics, required from seven months to one year from the time of receiving notice to proceed from the Government until the first gun mounts were produced;[1] that respondent had no manufacturing organization and no force of trained personnel to train unskilled employees; and that respondent's proposed general manager (Kennedy) was still, in February, 1942, a regular employee of another company in Ohio (R. 19-20). Kennedy had been assisting respondent in its plans under the expectation that he would sever his connection with the other company and become respondent's general manager; a contract between respondent and Kennedy, engaging him as general manager, was executed on February 24, 1942 (R. 20).

Under date of February 23, 1942, the Navy Department mailed to respondent a notice of award of contract, No. L[1]96553, for 150 gun mounts, in the

[1] Respondent's alleged contract would have required the completion of two mounts by May, 1942, three in June, 1942, five in July, 1942, and thereafter at least ten each month. *Supra*, p. 4; *infra*, p. 8.

amount of $2,087,555; the brief notice of award authorized respondent "to commence performance in accordance with the terms of your proposal," and indicated that a formal contract would later be forwarded for execution (R. 14, 20). This notice of award was received by respondent at Waynesboro on February 24, 1942 (R. 20). On the same day, after it had received the notice of award, respondent received a telegram from the Navy stating "notice of award contract nos. 96553 forwarded in error return for cancellation no award to you * * *" (R. 20).

This error in sending out the notice of award came about because it was the practice in the Navy Department, after a letter of intent had been issued, for the relevant papers to be sent to the Award Section of the Bureau of Supplies and Accounts, which would—unless notified to the contrary—in due course mail out a notice of award. In this case, the letter of intent of December 29, 1941, was forwarded to the Award Section in routine fashion and that office, not having been informed otherwise, followed its usual practice and sent out the notice of award on February 23, 1942. The officials who had actual discretion to award the contract did not reach their conclusion to terminate negotiations with respondent until after the routine notice of award had been forwarded without their knowledge, and the telegram of February 24, 1942, was sent in correction (R. 24). On March 5, 1942, the Navy followed up this telegram by mailing respondent a

formal cancellation of the original letter of intent of December 29, 1941 (R. 20). No formal written contract was ever consummated. The present suit for alleged anticipatory breach of contract was instituted by respondent in the court below on June 21, 1944 (R. 1).

The Court of Claims held, first, that the notice of award (dated February 23, 1942) constituted a binding agreement, that the revoking telegram came too late, and that the Government had breached the agreement by cancelling it (R. 24-25). The court then proceeded to assess the damages attributable to this breach. It found that respondent had incurred no expenditures or expenses in reliance on the letter of intent or the notice of award of contract (R. 21, 26), but it concluded that "if the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000." (R. 21, 26). This sum was reached by the court, avowedly acting as a jury (R. 26), on the basis of "about 4% of the gross contract price." (R. 26). Conceding that the respondent was "venturing into an untried field" and that it "would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits," the court's opinion cites the following factors as reason for believing that respondent would have made a profit: (a) Kennedy, the production manager, an able man, was willing to work for respondent at "a rather modest salary" ($1,000

per month), but with an arrangement for sharing in the profits (5%); (b) respondent's stockholders, who did not ask for government financing, must have anticipated a profit; and (c) "the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the plaintiff, if allowed to perform, would probably have succeeded in making a profit." (R. 25-26). Judgment was entered for $80,000[2] (R. 26).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "If the plaintiff [respondent] had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21).

2. In making an ultimate finding (*i. e.*, that respondent would have made a net profit) which is not sustained by its findings of the evidentiary or primary facts.

3. In failing to make the finding that respondent had not proved that it could have successfully performed the contract and made a profit thereon.

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[2] The court refused to award judgment for respondent on a separate claim, not involved in this petition, for the requisitioning of certain machinery, for which respondent had received payment in return for releases which were claimed below to have been invalid (R. 21-22, 26). Accordingly, the court found it unnecessary to pass upon the Government's counterclaim (R. 14-16), which was concerned solely with the separate claim decided against respondent.

4. In failing to hold that respondent had not proved that it suffered any legal damage from the Government's alleged breach of contract, and was therefore not entitled to recover.

5. In failing to hold that the Government could have properly terminated or cancelled respondent's contract, and that respondent was therefore not entitled to recover any unearned anticipated profits.

6. In awarding respondent a sum on account of unearned anticipated profits.

7. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

Respondent has unaccountably received a substantial award for unearned anticipated profits, although the Court of Claims' own detailed findings conclusively show that respondent suffered no damage, and could not even have made proper and timely performance of its contract, let alone emerged from the venture profitably. And this gratuitous award has been allowed in the face of established statutory and administrative policy — in both World Wars — not to pay anticipated but unearned profits to contractors whose contracts were cancelled or terminated before completion. The decision below cannot be justified on the basis of principles of general contract law applicable to suits between private parties. Beyond that, it involves an unwarranted imposition of substantial damages upon the Government for actions of its contract

ing officials which were proper in the circumstances and necessary in order to fulfill their responsibilities for the procurement of essential war supplies. For these compelling reasons, the Government respectfully submits that the decision below involves so clear a departure by the Court of Claims from its proper functions as to warrant invocation of this Court's supervisory powers.

1. The evidentiary findings make plain the hollowness of respondent's claim for profits.[1] The contract called upon respondent to begin delivery of the gun mounts within three months of the award and required the production of ten mounts within five months:—two were to be delivered in May 1942, three in June 1942, five in July 1942, and thereafter at least ten a month until the full quota of 150 were delivered (R. 18). But "the construction of gun mounts is difficult and exacting work" and "manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced" (Fdg. 5, R. 19). Moreover, when the instant contract was awarded, at the end of February 1942, the respondent "was not prepared to undertake work of the character proposed by the contract and

[1] For the purposes of this petition, we shall assume that the notice of award, dated February 23, 1942, consummated a binding contract.

could not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts" (Fdg. 5, R. 19). The company "had no manufacturing organization and no force of trained personnel to train unskilled employees"; it likewise had no actual force of mechanics or workers, and had apparently not begun to recruit a labor force, which it "expected" to secure from among former railroad shop mechanics in the vicinity (Fdg. 5, R. 19-20); its officers were then engaged and interested in other businesses in another city, and its only local representative was occupied in the real estate business (Fdg. 2, R. 17); Mr. Johnson, the one executive employee, was apparently not a production expert, and Mr. Kennedy, the proposed general manager (who was an engineer), was working elsewhere and was not actually hired until after the contract award (Fdgs. 3, 5; R. 17, 20). Moreover, the plant had been entirely idle for some years (Fdg. 2, R. 16-17), and had not been actively engaged in a major project since 1931 (Fdg. 2, R. 17); certain plant expenditures had been made, in 1940 and early 1941, in connection with respondent's endeavor to secure Navy work, but most of these were "in the nature of routine maintenance," and none involved equipment or material specially pertinent to the instant contract (Fdg. 7, R. 21). Respondent's previous work had been in fields far removed from gun mounts (Fdg. 2, R. 16-17), and since respondent's foundry was incapable of producing the cast steel forgings re-

quired for the gun mounts, subcontracts would have to be made for these castings as well as for other parts of the work (Fdg. 5, R. 19). Respondent had, however, not yet made any such subcontracts, although it had contacted certain producers, who were willing to furnish castings and other parts (Fdg. 5, R. 19). As late as February 19, 1942, the plant was completely closed, with only a watchman in attendance, and no operations were being carried on; no work had as yet been performed on the contract (Fdg. 5, R. 19). No expenditures or expenses had been incurred by respondent in reliance on the Navy's letter of intent or its notice of award of contract (Fdg. 7, R. 21). Indeed, in the light of the foregoing it may well be doubted that respondent could have met the conditions required by the surety company before it would execute the performance bond which the Navy Department had definitely decided to require in this instance (R. 17-19, 20).

To recover the profits realizable by full performance, respondent bore the burden of showing by "clear and direct proof" both that it would have complied with its contractual obligations and that the result would have been a net gain which can fairly be estimated without speculation. *United States v. Behan*, 110 U. S. 338, 344; *Howard v. Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 205-210.[*]

[*] To the same effect: *White River Levee Dist. v. McWilliams Dredging Co.*, 40 F. 2d 873, 876-877 (C. C. A. 8); *Dyal v. Wimbish*, 124 F. 2d 464, 467 (C. C. A. 5); *Polar Steamship*

thus from the court's findings of the evidentiary or primary facts, the only conclusion that can be drawn is respondent's entire failure to establish that it would have successfully performed its contract at a profit.[5] Thus, the Court of Claims' contrary finding of ultimate fact, that respondent "would have made a net profit of not less than $80,000" (Fdg. 8, R. 21), stands bereft of all factual support, plainly overridden by the "subordinate or circumstantial findings," and therefore not sustainable "in point of law." (*United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-206; 303 U. S. 26, 31; *Lowrie* v. *Castle*, 225 Mass. 37, 51; cf. Act of May 22, 1939, c. 140, 53 Stat. 752, formerly 28 U. S. C. 288).

The court's opinion—but not its findings (cf. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206; *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Causby*, 328 U. S. 256, 267)[6]—marshals in support of the judgment the

Corp. v. *Inland Overseas Steamship Corp.*, 135 F. 2d 835, 840-841 (C. C. A. 4), certiorari denied, 320 U. S. 774; *Suburban Contracting Co.* v. *United States*, 76 C. Cls. 533, 544; A. L. I., Restatement of Contracts, sec. 331.

[5] On the basis of evidentiary or primary findings almost identical with those adopted by the court below, the Commissioner of the Court of Claims rationally concluded that "the evidence does not establish that plaintiff could have successfully performed the contract nor made any profit thereon."

[6] A Court of Claims' judgment "may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover". 299 U. S. at 422.

three factors to which we refer above (*supra*, pp. 9-10),[1] but these clearly provide only the flimsiest of foundations, especially in contrast to the impressive firmness of the detailed findings which the court sloughed off with the assertion that the respondent "would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits" (R. 26). We note particularly the extraordinary function accorded by the Court of Claims' opinion to the Government's presumed "consideration and tolerance" for war and defense contractors. The findings demonstrate that respondent could not have rendered timely performance of its contract; and make it highly doubtful whether the 150 gun mounts would ever have been produced, even at a loss. The findings also show that the Navy's attitude toward respondent's productive capacities was, at the least, one of great caution. In counterbalance to these facts, the court poses the singular, and unproved, hypothesis that the Government's contracting officials would have shown such indulgence and aid that respondent would have emerged from its venture

[1] The three factors are: (a) Kennedy (the production manager) was willing to work for respondent at "a rather modest salary" ($1,000 per month), with a 5% share in the profits; (b) the stockholders, who did not ask for government financing, "must have anticipated that the contract would produce a profit"; (c) the Government treated defense contractors, at this time, "with consideration and tolerance," if they did their best to perform (R. 25).

not only unmarred by default but possessed of a sizeable profit. Nothing in the record, the evidence, or in common knowledge, supports this supposition of unmeasured generosity. And even if the premise were sustained by the findings or by general knowledge of those times, respondent certainly could not rest a legal title to anticipated profits for breach of contract on the Government's acts of grace in overlooking defaults and providing extra-contractual aid. In the very beginning of the Court of Claims' history, this Court strongly warned against founding contract claims on the Government's "magnanimity and generosity." *Smoots's Case*, 15 Wall. 36, 45.[*]

2. a. The grave error of the lower court in awarding anticipated profits is further underscored by the opposite treatment of such profits in the termination or cancellation of government war contracts for the Government's own convenience. During most of World War II, both the War and Navy Departments required supply contracts as large

[*] "There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. * * *"

as respondent's to contain a termination clause permitting the Government to terminate performance at any time. The wording of these clauses varied, and they were often revised, but from the beginning their provisions uniformly prohibited profits on uncompleted work.[9] The War Department issued formal procurement directives requiring the inclusion of such a termination article in all large supply contracts entered into after September 1941,[10] while the Navy, which employed more informal means of implementing its procurement policy, apparently developed its termination clauses late in 1941 and early in 1942, and required their inclusion in most contracts thereafter executed.[11]

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[9] See Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems, 449, 452-459, 487-492; Hearings before the Committee on Military Affairs, H. of Reps., 78th Cong., 1st. sess., on H. R. 3022, pp. 27-29, 36-37, 43-44, 562; Uniform Termination Article for Fixed-Price Supply Contracts, 9 Fed. Reg. 478, 13405; Joint Termination Regulations (adopted by the War and Navy Departments, October 1944), secs. 533.538, 541-543, 9 Fed. Reg. 13361-2, secs. 845.533 *et seq.*; Office of Contract Settlement Regulation No. 7, 32 C. F. R., 1944 Supp., 8006.3 (e), p. 3065.

[10] See Malman, *supra*, fn. 9, p. 18, at 452.

[11] The Navy Department informed the Senate, in January 1944, that "Standard termination clauses for fixed price contracts were developed late in 1941, and in general form and substance have been inserted in most contracts entered into since that time except for ship-construction contracts, which constitute a separate problem." Hearings before a Subcommittee of the Committee on Military Affairs, U. S. Senate, 78th Cong., 2d sess., on S. 1268, 1280, and 1470 ("Problems of Contract Termination"), p. 553. To similar effect is a letter of the Acting Secretary of the Navy, dated October 10,

It is probable, therefore, that respondent's formal written contract (which would have been entered into sometime after February 24, 1942) would have authorized the Government to discontinue respondent's performance at any time for any reason, and the Navy could have stopped performance because of dissatisfaction with respondent as a contractor, just as it actually did, without making the United States liable for anticipated but unearned profits. As we show below, the existence of a right in the Government to terminate performance under the contract would wholly destroy respondent's demand for profits, even though the naval authorities did not purport to act under this right. At the least, the more-than-possibility that respondent's formal contract would have expressly permitted such a termination further undercuts respondent's

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1943, reprinted in Hearings, *supra*, at p. 271. See also affidavit of H. Struve Hensel, formerly Assistant Secretary of the Navy (included in transcripts of record in *Pownall* v. *United States*, October Term, 1947, No. 74, and *Alexander Wool Combing Co.* v. *United States*, October Term, 1947, No. 95), describing the termination clauses (including the provisions as to profits), contained in Navy supply contracts in the "first several months of 1942" (R. 174, 177-178, No. 74, October Term, 1947; R. 224, 227, No. 95, October Term, 1947). It is also noteworthy that Mr. Hensel states that during this period (1941-early 1942) Navy "instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs * * *" and "these directives could be rather informally issued and distributed" (R. 173, No. 74, October Term, 1947; R. 224, No. 95, October Term, 1947). The Court may properly take judicial notice of this affidavit as an official statement, by an authorized representative of the Navy Department, contained in the records of the Court. Cf. *United States* v. *Pink*, 315 U. S. 203, 216.

already weak claim to have shown its loss of profits by the required "clear and direct proof." Of course, respondent could recover any expenses incurred under the contract. But here no such expenses were shown.

b. It may also be that the Government's contracting officials were statutorily authorized, in February 1942, to terminate respondent's performance, regardless of contractual termination clauses, without subjecting the United States to liability for wholly anticipatory profits. In World War I, the Act of June 15, 1917, 40 Stat. 182, empowered the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material", upon payment of "just compensation." Both this Court and the court below held that under that Act, upon cancellation, the contractor was not entitled to recover anticipated profits. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 523-524; *Barrett Co.* v. *United States*, 273 U. S. 227, 235; *Meyer Scale & Hardware Co.* v. *United States*, 57 C. Cls. 26, 50; *Hetrick Mfg. Co.* v. *United States*, 62 C. Cls. 265, 270. The same rule was applied to war contracts made prior to the 1917 act, on the ground that they were necessarily executed subject to Congress' power to enact such legislation. *De Laval Co.* v. *United States*, 284 U. S. 61, 73. In the instant case, Title II of the First War Powers Act (Act of December 18, 1941, c. 593, sec. 201; 55 Stat.

839, 50 U. S. C. App. 611), as implemented by Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R., 1941 Supp., pp. 330-332), may well have furnished the Navy with an analogous power. That statute authorized the President, or his delegates, "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate prosecution of the war." In accordance with its wording, legislative history, and purpose, the war agencies and the Attorney General adopted a broad and liberal interpretation of this grant, construing it as extending the dispensing power not only to statutory contracting requirements but also to the common-law principles of contract law, such as those involving consideration.[12] The Act was applied by the Army and the Navy to the termination by agreement of war contracts not containing a termination article (see Opinion of the Judge Advocate General of the Army, SPJGC 164, September 16, 1942, digested in 1 Bull. J. A. G. No. 5, pp. 304-

[12] For the construction of Title II followed by the Attorney General and the War and Navy Departments, and for resumés of its legislative history, see 40 Op. Atty. Gen. No. 53, August 29, 1942; Kramer, *Extraordinary Relief for War Contractors*, (1945) 93 U. of Pa. L. Rev. 357; Rowley, *The First War Powers Act Cases* (appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2d ed., 1946), pp. 1233-1238); Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944), 44 Col. L. Rev. 427, 194 *et seq.*

305); and although the service departments do not appear to have utilized it where the contractor was unwilling to countenance cancellation, we believe that the breadth of the statute's award of authority may well have empowered the Navy unilaterally to amend or modify respondent's contract by terminating all performance, subject to the type of just compensation paid in World War I under the 1917 Act.

If the Government was authorized to cancel the contract, either by a termination article which would have been included in the formal agreement or by Title II of the First War Powers Act, it is immaterial that the Navy did not at first seek to cancel or terminate performance but insisted that no contract had been consummated.[13] It is the substance of the Government's action, rather than the form of words, which should control the issue of liability. In *College Point Boat Corp. v. United States*, 267 U. S. 12, 15-16, this Court refused to allow anticipated profits, as for a breach, where the United States did not purport to cancel the contract under the 1917 Act, but ordered a work stoppage which apparently constituted an anticipatory breach; the existence of the statutory right to cancel, even though not availed of, was held sufficient to bar recovery of prospective gain.

[13] It is to be noted that the Navy's letter of March 5, 1942 (R. 20), expressly constituted a cancellation of the letter of intent (dated December 29, 1941), and was obviously intended to terminate all contractual arrangements.

c. In any case, the deep-rooted and long-established policy against allowing war contractors to reap anticipated unearned profits strongly militates against the Court of Claims' mechanical application of common-law damage rules in favor of a war contractor so little injured as respondent. In the first war, this policy was reflected in the Act of June 15, 1917, *supra*, and in the Dent Act of 1919 (40 Stat. 1272) which expressly barred award of "prospective or possible profits." During the last war, the same policy was administratively followed in all termination matters by the armed services (*supra*, pp. 18-19), and was embodied in the Contract Settlement Act of 1944 (Act of July 1, 1944, c. 358, 58 Stat. 649, 41 U. S. C. 101).[28] "The policy of the government forbade the allowance of profits on that part of a cancelled commitment on which no expenditure had been made and no work had been done." Office of Contract Settlement, *A History of War Contract Terminations and Settlements* (July 1947), p. 27. Heed should surely have been paid to this principle in calculating an award to a war contractor whose agreement was cancelled, in substance, in the same way in which

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[28] Section 6(d)(5) of this Act required war contracting agencies to take into account, in settling terminated contracts, "such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances." On the basis of the Act, Regulation No. 7 of the Office of Contract Settlement provided: "Profit should be limited to preparations made and work done for the terminated portion of the contract * * *." 32 C. F. R., 1944 Supp., sec. 8006.3(e), p. 3065.

thousands of other war contracts were terminated for the convenience of the Government. By closing its eyes to wartime procurement history and policy, the Court of Claims has granted an unmerited windfall to a contractor whose "damages" were merely nominal. In so holding, the Court of Claims has manifested an approach to Government contract litigation which calls for review and correction by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

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